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In the Supreme Court of the United States

October Term, 1957.

OLIN STONE, ALDA STONE, VERA C. SMITH, FRANCIS A. MILLER, and the WOOD OIL COMPANY, a corporation,
Petitioners,

vs.

DANUBE McFARLIN, MAMIE SUE McFARLIN, DAVE MORGAN, DAVE MORGAN, doing business as DAVE MORGAN OIL COMPANY, R. L. TAYLOE, ROSALIND NO EAR, and THE BUREAU OF INDIAN AFFAIRS OF THE DEPARTMENT OF INTERIOR OF THE UNITED STATES OF AMERICA, ***Respondents.***

BRIEF of PETITIONERS.

Petition for Rehearing of Order denying Petition for Writ of Certiorari to the Court of Appeals of the Tenth Circuit.

NEAL E. McNEILL,
Attorney for Petitioners.

Of Counsel:
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IN THE SUPREME COURT OF THE UNITED STATES.
October Term, 1957.

No. 712

OLIN STONE, ALDA STONE, VERA C. SMITH, FRANCIS A. MILLER, and the WOOD OIL COMPANY, a corporation, ***Petitioners,***

vs.

DANUBE McFARLIN, MAMIE SUE McFARLIN, DAVE MORGAN, DAVE MORGAN, doing business as DAVE MORGAN OIL COMPANY, R. L. TAYLOE, ROSALIND NO EAR, and THE BUREAU OF INDIAN AFFAIRS OF THE DEPARTMENT OF INTERIOR OF THE UNITED STATES OF AMERICA, ***Respondents.***

Petition for Rehearing of Order denying Petition for Writ of Certiorari to the Court of Appeals of the Tenth Circuit.

Petitioners respectfully petition for rehearing of the order of March 3, 1958 denying their petition for writ of *certiorari* to the Court of Appeals of the Tenth Circuit.

Statement and Jurisdiction.

On January 7, 1958 there was filed pursuant to Title 28 U. S. Code, Section 1247 (3) and 2191 (c) a petition for writ of *certiorari* to the Court of Appeals of the Tenth Circuit. On March 3, 1958 this court denied that petition for writ of *certiorari*.

This petition for rehearing is filed pursuant to Rule 58 (2) of the Rules of the Supreme Court of the United States. The grounds upon which it is based are that there exists intervening circumstances of a substantial or controlling effect and that there are substantial grounds available to petitioners for granting the petition which were not previously presented for the reason at the time of preparing and filing the petition for writ of *certiorari* the syllabi of the case was not available to the petitioners as it had not been reported but is now reported in 249 F. 2d 54.

Reasons for Granting the Rehearing and the Petition.

I.

The opinion below in the statement in the syllabi and particularly syllabus one has placed a construction upon Title 60, O. S. 1951, Section 335, in conflict with the general Rule of Law announced in *Hunzicker* v. *Kleeden*, 161 Okl. 102, 17 P. 2d 384, 385, *Mapes* v. *Neustadt*, 197 Okl. 585, 173 P. 2d 442, followed in *Herron* v. *Choctaw-Chickasaw Nations*, (10th Circuit) 228 F. 2d 830.

It is admitted the stream between Lots 7 and 9 did not change its course by avulsion.

The court has demonstrated by its statement in the syllabi that that portion of Lot 7 between the bed of the river as it existed at the time of the survey and as it now exists accumulated to the North bank of the stream or to Lot 9 that it reached said conclusion by overlooking or giving no consideration to the uncontroverted fact, that before this portion of said lot could have reappeared as dry land, it must have been first submerged by the southward movement of the stream.

It follows the court by omitting any reference to the above factual situation which is uncontroverted has reached a conclusion unwarranted under the uncontroverted facts.

It further follows that if consideration had been given to the uncontroverted fact that a portion of Lot 7 once submerged had reappeared as dry land within the boundaries of said lot as fixed by the government survey thereof the court below could not have held that under Section 335, Title 60, O. S. 1951 the land involved accreted to Lot 9 but rather would have held that the same remained a part of Lot 7. The opinion under the uncontroverted facts is, therefore in direct conflict with the decision of *Hunzicker* v. *Kleeden, supra,* and the cases therein cited, to-wit: *Allard* v. *Curran,* 41 S. Dak. 73, 168 N. W. 761; *Association* v. *Schrivner,* 64 N. J. Law 550, 46 Atl. 690, 51 L. R. A. 425; *Stockley* v. *Cissna,* 119 F. 2d 812; *Keel* v. *Sutton,* 142 Tenn. 341, 219 S. W. 351; *City of St. Louis* v. *Rutz,* 138 U. S. 226, 11 S. Ct. 337, 34 L. Ed 941, 950. The above cases are uniform in holding where a stream makes inroads upon a tract of land and the same became submerged by reason of erosion or other causes, and as the river changes its course the land of said tract reappears either by *accretion* or reliction it continues to be the property of the former owner as if no erosion or submerging occurred. See also *Herron* v. *Choctaw-Chickasaw Nations, supra.*

This court in *State of Arkansas* v. *State of Tennessee,* 346 U. S. 158, 38 S. Ct. 301, 305, in referring to the general rule of law applicable where land had been submerged and

reappeared stated the same was governed and controlled by the "Doctrine of Submergence and Reappearance of Land," and remained the property of the former owner. The opinion under the uncontroverted facts being in direct conflict with the above authorities, the rehearing should be granted and the writ of *certiorari* issue.

II.

The opinion is further erroneous and in conflict with the decisions of the Supreme Court of Oklahoma and the Court of Appeals of the Tenth Circuit in the following particulars:

(a) The opinion stated:

"But here we have no definite, fixed or established line which can be ascertained at all times."

The above statement is unsupported by evidence, facts or circumstances as there was introduced and appears in the transcript of the record (p. 3) as exhibit "A" the government survey and field notes of the survey and the government plat approved and filed in the general land office September 16, 1872, which plat and field notes attached disclose the definiteness and certainty of the boundaries of Lot 7 as containing 30.70 acres. The stream is definitely located as on the Northeast corner of Lot 7 on the South bank of said stream is an iron Post No. 11 which is 63 chains North of the Southeast corner of Sec. 30. That immediately to the North thereof on the section line is the North bank of said stream fixed by iron Post No. 21 which is 8 chains North of Post 11. The minutes and degrees that the course of the river takes to the Southwest between

that portion of Lot 9 that is immediately North of a portion of Lot 7 is shown by the field notes. There is not a line of evidence that the center of the stream as fixed by the survey and plat cannot be fixed by measurement from the plat and survey.

This court has been uniform in holding that official government plats and surveys import validity and in the absence of obvious mistakes or fraud which would cause the government to recall the same and have them corrected said plats and surveys should be so considered by the court.

See *Grand Rapids & I. R. Co.* v. *Butler*, 159 U. S. 87, 15 S. Ct. 991; *Mitchell* v. *Smale*, 140 U. S. 406, 412, 413, 11 S. Ct. 819, 840, wherein the court quoted from *Hardin* v. *Jordan*, 140 U. S. 371, 11 S. Ct. 808, 838, as follows:

> "We think it a great hardship, and one not to be endured, for the government officers to make new surveys and grants of the beds of such lakes, after selling and granting the lands bordering thereon, or represented so to be. It is nothing more or less than taking from the first grantee a most valuable, and often the most valuable part of his grant. * * * to place such persons in possession under a new survey and grant, and put the original grantee of the adjoining property to his action of ejectment and plenary proof of his own title, is a cause of vexatious litigation, which ought not to be created or sanctioned."

These surveys are binding except where there are plain and obvious mistakes and it is only in such cases that the government will have a right to recall a survey and have it corrected by courts or other process.

The force and effect of the above statement is to hold that the government having surveyed and platted a tract of land could not thereafter by a subsequent survey deprive the owner of what it had conveyed to him without violating the 5th amendment of the Constitution of the United States.

If the government could not deprive one of *riparian* rights by making a new survey clearly the patentees to Lot 9 could not in reliance upon a state statute make a private survey and deprive the owners of property conveyed to them by the government without violating the 5th amendment of the Constitution of the United States.

Such is the holding in *Choate* v. *Trapp*, 224 U. S. 665, 32 S. Ct. 565, wherein it is stated:

> "Under the 5th amendment * * * no statute would have been valid which reduced his fee to a life estate, or attempted to take from him 10 acres or 50 acres or timber growing on the land. After he accepted the patent the Indian could not be heard either at law or in equity to assert any claim to the common property. If he is bound so is the tribe and government when the patent was issued."

In the case at bar it is undisputed that the government as a party to the suit is proceeding upon a state statute and a private survey to deprive these petitioners of 9.83 acres of land, title to which is traced to a government trust patent issued prior to statehood and which petitioners and their successors in title have held since restrictions were removed in a warranty deed from the allottee September 26,

1910 and on which the petitioners and their successors have paid taxes since said date.

We submit the mere statement that the petitioners are being deprived of private property evidenced by a government trust patent dated October 12, 1895 and by conveyance from the allottee September 26, 1910 upon which they have paid the taxes since said date and of an admitted value in excess of $3,000.00, all based upon a state statute, presents a question of such substantial importance that the petition for rehearing should be granted and the writ issued to review said holding of the court.

(b) The court below makes the further statement:

> "There would still, however remain the question of whether it would be required that the river recede and the land in dispute reappear on the same side of the stream with the remainder of Lot 7."

While that question was not discussed in the opinions in *Hunsicker* v. *Kleeden, supra; Mapes* v. *Neustadt, supra,* and *Herron* v. *Choctaw-Chickasaw Nations, supra,* if the boundaries are susceptible of being definitely ascertained by government survey it is immaterial which side of the stream the land reappears on.

If it was avulsion the question would be obviously immaterial.

The court in *Herron* v. *Choctaw-Chickasaw Nations, supra,* in referring to the case of *Hunsicker* v. *Kleeden, supra,* and *Mapes* v. *Neustadt, supra,* stated:

> "The latter case was one involving avulsion of a river but the general rule applicable to cases involving erosion or submerging of land was clearly recognized with unqualified approval."

(c) The court in its opinion further states:

"Had the patent conveyed Lot 7 to the center of the stream, as established by the survey of 1872, we would have a fixed line which might bring the case within the *Hunzicker* decision."

The above statement compounds the confusion of the opinion herein. We assume the court was holding the patent did not convey title to Lot 7 to the center of the stream which holding would be in direct conflict with *U. S.* v. *Champlin Refining Company* (10th Circuit) 156 F. 2d 769, affirmed by this court 331 U. S. 788, 67 S. Ct. 1346. In that case the court was construing a patent identical with the one in the case at bar which had conveyed "Lot 6, Section 24, Township 23 North, Range 3 East of the Indian Meridian in Oklahoma". This was a trust patent issued June 10, 1907, prior to statehood. Without reference to the survey the court in that case held that the patent "without more conveyed the title to the center of the stream". Citing in support thereof *U. S.* v. *Brewer-Elliott Oil and Gas Co.*, (8th Circuit) 270 Fed. 100; *Brewer-Elliott Oil and Gas Co.* v. *U. S.*, 260 U. S. 77, 43 S. Ct. 60.

Clearly if the government surveys and plats a tract of land and designates it as Lot 7 and thereafter conveys it as Lot 7, it cannot be said that the patent does not refer to the survey or was not made pursuant thereto.

It is therefore clear that the reasons set forth by the court for not applying the rule followed in the *Hunzicker* case are not supported by evidence, facts, or logic, but are contrary to the decisions above cited and in direct conflict therewith and for that reason, if for no other, this court should grant the rehearing and issue the writ.

Although Propositions I. and II. above were available to petitioners at the time of the filing of the petition it was not made clear from the opinion until the same was printed with syllabi that the court founded its conclusion upon the denomination of a portion of land involved herein as "accumulated" land without reference to the uncontroverted fact that said land had by erosion and submergence and change of the course of the stream reappeared as dry land.

Conclusion.

It is apparent, as demonstrated by the syllabi, not available when the petition for the writ was prepared, that the lower court has construed Title 60, O. S. 1951, Sec. 335, in direct conflict with the decisions of the Supreme Court of Oklahoma in *Humzicker* v. *Kleeden, supra*; *Mapes* v. *Neustadt, supra*; followed and applied in *Herron* v. *Choctaw-Chickasaw Nations, supra.*

The Supreme Court of Oklahoma is committed to the rule where a nonnavigable stream makes inroads on a tract of land bordering thereon and by erosion or submergence the stream gradually makes further inroads and the eroded and submerged land gradually reappears as dry land, whether by accretion or reliction so long as the boundaries fixed by the government survey can be ascertained with reasonable certainty the title remains in the original owner as if no erosion or submergence had occurred.

Although in the instant case it is uncontroverted the nonnavigable stream had made inroads on Lot 7 by erosion and submergence and as the stream made further inroads a portion of the land of Lot 7 once submerged reappeared as dry land, the court in its opinion without referring to the submerging of the land has defined or designated the same as "accumulated" land although within the boundaries of Lot 7 as fixed by the government survey thereof the court has held under the above statute the land accumulated to Lot 9.

In view of the law announced in the syllabi above we have deemed it proper herein to refer to the reasons stated in the opinion for not following and applying the law announced in the *Hunzicker* case and point out that the same are not only unsound but that the same are in conflict with the Oklahoma decisions applicable thereto.

WHEREFORE petitioners pray for a rehearing herein and for the issuance of a writ of *certiorari* to the United States Court of Appeals for the 10th circuit.

Dated, Tulsa, Oklahoma,
March 21, 1958.

Respectfully submitted,

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Of Counsel:
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Certificate.

I, Neal E. McNeill, hereby certify that I am a member of the bar of the United States Supreme Court and counsel for petitioners herein; that the within petition is presented in good faith and not for delay. Said petition is restricted to "intervening circumstances of substantial effect", and "other substantial grounds available to petitioners although not previously presented", and subscribe my manuscript signature hereto.

Dated at Tulsa, Oklahoma this 21st day of March, 1958.

NEAL E. McNEILL,

Attorney for Petitioners.